### c. Definition of Video Programming

**Background**

103. The 1984 Cable Act defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."[165] In the Second Report and Order, the Commission concluded that Congress intended to prohibit only telephone company provision of programming comparable to that provided by broadcast television in 1984.[166] The Commission stated that while it is not possible to classify with precision all potential services to be offered over the video dialtone platform, "to the extent a service contains severable video images capable of being provided as independent video programs comparable to those provided by broadcast stations in 1984, that portion of the programming service will be deemed to constitute 'video programming' for purposes of the statutory prohibition."[167] The Commission added that video services involving complex viewer interaction generally fall outside the scope of video programming, although the Commission stressed that elements of an interactive video service may be deemed video programming if those elements can readily be separated and provided as independent programming comparable to that carried in 1984.[168]

**Pleadings**

104. No party disputes the Commission's holding that Congress intended to include within "video programming" only that which is comparable to programming provided by television broadcasters in 1984. Three LECs, however, argue that the Commission's interpretation of the types of services that meet this definition is overbroad and inconsistent with the terms and legislative history of the 1984 Cable Act.[169]

105. NYNEX argues that the term video programming should encompass only "continuously playing programming that is generally available to a mass audience of viewers who use their television screens to view material." NYNEX maintains that the term should

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165 47 U.S.C. § 522(16).

166 Second Report and Order, 7 FCC Rcd at 5820-21, para. 74.

167 Id.

168 Id. at 5821, para. 75.

169 See Ameritech Petition at 8-11; BellSouth Petition at 1-8; NYNEX Petition at 9-11. See also Ameritech Reply Comments at 2; USTA Comments at 12-13.

not include video-on-demand services, which permit viewers to select programs and the time to view them.[170] Ameritech suggests an even narrower definition that would limit video programming to services that were actually provided by broadcast companies in 1984.[171]

106. Both NYNEX and Ameritech criticize the severability concept. NYNEX argues that the concept only adds confusion to the definition.[172] Ameritech asserts that the attempt to separate content from the end product has no basis in the 1984 Cable Act. Ameritech also argues that the narrowest possible construction of the term video programming is necessary to provide consumers with meaningful video programming options and to avoid violating LEC First Amendment rights.[173]

107. BellSouth confines its comment to video-on-demand services.[174] It argues that a video-on-demand subscriber's ability to manipulate and control the video images is so intertwined with the delivery of those images that there is no effective way to sever the interactive functionality from program content.[175] It argues, further, that because a video-on-demand subscriber selects the video images delivered, this service more closely resembles two-way information gateway services than traditional one-way broadcasting.[176] It therefore asks that we reconsider the

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170 NYNEX Petition at 10-11.

171 Ameritech Petition at 8-11. Thus, whereas NYNEX would include pay-per-view services within the definition of video programming, Ameritech would not and argues that it was Congress' intention to treat them differently. Id.

172 NYNEX Petition at 9-11.

173 Ameritech Petition at 8-11.

174 BellSouth Petition at 1-8.

175 Id. BellSouth purports to distinguish video-on-demand services from pay-per-view services on the ground that pay-per-view subscribers cannot dictate when video images are broadcast or the precise manner or order in which those images are displayed. Id. at 5-7. BellSouth argues that even if subscribers may choose their desired camera angle for a pay-per-view service, all subscribers choosing the same camera angle option will see the same video images at the same time. According to BellSouth, the camera angle option is thus a severable interactive functionality. Id.

176 Id. at 1-8.

Commission's finding that video-on-demand content falls within the definition of video programming.

108. Several parties oppose LEC requests for a revised interpretation of the definition of video programming.[177] CFA/CME and NAB maintain that the Commission's severability analysis is consistent with Congressional intent and supported by the legislative history of the 1984 Cable Act.[178] NCTA, NECTA, and CLG argue that subscriber interaction, such as the ability to fast-forward or rewind a program or choose the time in which to view it, does not transform the underlying nature of that program. NCTA argues that to hold otherwise "would open a gaping loophole in the cable-telco cross-ownership ban, exploitable by telephone companies who claim to have added a few nebulous 'interactive functions' to the delivery of what is otherwise conventional video programming."[179]

**Discussion**

109. We affirm our interpretation of the statutory definition of video programming set forth in the Second Report and Order. We believe that the Commission's interpretation most closely comports with Congressional intent in enacting the 1984 Cable Act.[180] We also affirm the Commission's conclusion that video-on-demand images can be severed from the interactive functionalities and thereby constitute video programming.

110. In reaching this conclusion, we specifically reject LEC arguments that the severability test is inconsistent with the 1984 Cable Act. We addressed this issue in the Second Report and Order,

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177 CFA/CME Comments at 21-24; NAB Comments at 3-4; CLG Comments at 6-8; NCTA Comments at 9-10; and NECTA Comments at 4-5.

178 CFA/CME Comments at 22-23; NAB Comments at 4. CFA/CME maintains that the legislative history of the 1984 Cable Act makes clear that the addition of an interactive component does not automatically transform a video program into a non-video program. CFA/CME Comments at 24. Similarly, NAB argues that the LEC suggestion that video programming be defined with reference to the mode of delivery, as opposed to the content of the underlying image, "goes far beyond Congressional intent." NAB Comments at 4. CFA/CME also asserts that Ameritech's request that video programming be limited to programming provided in 1984 ignores that the statutory definition also includes programming "comparable" to that provided by broadcasters in 1984. CFA/CME Comments at 23-24.

179 NCTA Comments at 10.

180 Second Report and Order, 7 FCC Rcd at 5821, para. 75.

concluding that the severability test most fully reflects the intent of the statute. We stated that the mere inclusion of some interactive capability should not be sufficient to transform video programming into non-video programming.[181] We noted, for example, that offering a consumer the ability to choose among several camera angles in viewing a sporting event, or to replay or fast-forward portions of a video program, does not change the nature of the underlying material. Despite LEC arguments to the contrary, we continue to find no principled basis for such distinctions, and we cannot conclude that Congress intended for us to make them. In fact, the legislative history of the 1984 Cable Act specifically distinguishes between video programming and subscriber interaction with a cable operator to select video programming, thereby indicating that Congress recognized their severability.[182] Moreover, eliminating the severability test would effectively allow LECs to bypass rules governing LEC provision of video programming by adding interactive functionalities to broadcast-comparable programs. For these reasons, we also reject Ameritech's claim that we should adopt a narrower definition of video programming to avoid violating LEC First Amendment rights. We believe that the definition we adopted in the Second Report and Order, and affirm herein, is narrowly tailored to achieve Congress's intent in adopting the cross-ownership ban.

111. We also reject BellSouth's contention that video-on-demand content is not severable from the interactive components of video-on-demand service. While consumers may, through features such as fast-forward and rewind, alter the images that they view, there is no reason why the telephone company cannot identify and sever the underlying program in its unaltered state. Moreover, contrary to BellSouth's claim, we do not believe that the level of subscriber control over video-on-demand images is such as to render the service more comparable to a gateway service than a traditional video programming service.

### 3. Federal/State Jurisdiction over Video Dialtone

**Background**

112. The Commission stated in the Second Report and Order that the basic video dialtone platform is presumptively an interstate service over which the Commission has exclusive jurisdiction,[183] and that the LEC video dialtone facility is an "integral component in an indivisible dissemination system which

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181 Id. at 5821-23, paras. 74-77.

182 House Cable Report, supra note 105, at 41, 43.

183 7 FCC Rcd at 5819-20, para. 72

forms an interstate channel of communication."[184] The Commission also concluded that existing jurisdictional determinations regarding enhanced services would apply to enhanced services provided by LECs as part of video dialtone.[185] The Commission noted, however, that it may need to address the extent of its jurisdiction in the context of specific Section 214 applications, depending on the particular video dialtone configuration proposed.[186]

**Pleadings**

113. Several state commissions seek reconsideration of the Commission's jurisdictional conclusions. Some state commissions seek clarification that the Commission never intended to assert exclusive jurisdiction over basic video dialtone service.[187] For example, New York State Department of Public Service (NYDPS) argues that, although the Commission suggested in the Further Notice that it would regulate the level one video dialtone platform under Title II of the Act, it never suggested it would assert exclusive jurisdiction over the platform.[188]

114. Some state commissions assert that Section 2(b) of the Act prohibits the Commission from asserting exclusive jurisdiction over the basic video dialtone platform, on the grounds that not all uses of the platform are interstate.[189] Some state commissions argue that the Commission's reliance on General Telephone as authority to assert exclusive jurisdiction over video dialtone is misplaced, and that video dialtone is significantly different from the "channel service" at issue in General Telephone.[190] For example, they assert that, in contrast to channel service, video dialtone may be

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184 Id. (citing General Telephone of California v. FCC, 413 F.2d 390, 401 (D.C. Cir. 1969), cert. denied, 396 U.S. 888 (1969) (General Telephone)).

185 7 FCC Rcd at 5819-20, para. 72

186 Id. at 5820, para. 73.

187 NYDPS Petition at 2-3; PaPUC Petition at 7.

188 NYDPS Petition at 2.

189 NARUC Petition at 2; California Petition at 6, 7 n.2.

190 NARUC Petition at 6-9; PaPUC Petition at 6; California Petition at 4-5. In General Telephone, the D.C. Circuit agreed with the Commission that the Communications Act requires a Section 214 certification for LEC provision of channel services. The court based its decision, in part, on the Commission's broad plenary jurisdiction over broadcasting. 413 F.2d at 401.

integrated with the current telecommunications network,[191] will provide potentially interactive services,[192] will provide services to multiple programmers, and will not require LECs or programmers to obtain a cable franchise.[193] Some assert that, given the Commission's admission that video dialtone configurations are uncertain, it is premature for the Commission to assert exclusive jurisdiction over video dialtone.[194]

115. State commissions place particular emphasis on the fact that many services to be provided over the video dialtone platform "have nothing to do with broadcasting."[195] NYDPS, for example, states that the video dialtone platform will provide for the provision of "nonprogramming video services" and "nonvideo communication services," which bear no resemblance to channel services.[196] For these reasons, state commissions assert, the Commission cannot conclude that video dialtone service constitutes a "link" in the "indivisible stream" of "interstate broadcast transmission."[197]

116. State commissions argue further that some video dialtone services, including video as well as non-video services, will likely be intrastate in nature.[198] They therefore contend that all non-broadcast signals transmitted over the video dialtone platform should be treated like telephone service and subject to dual jurisdiction.[199] Some state commissions contend that the Commission should regulate all signals transmitted over the common carrier

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191 NARUC Petition at 4, 7; PaPUC Petition at 6; BellSouth Comments at 10-11.

192 NARUC Petition at 4, 7. See also California Petition at 5-6.

193 NARUC Petition at 7; California Petition at 4.

194 NYDPS Petition at 4; PaPUC Petition at 2. BellSouth contends that the Commission should refrain from preempting states until it has an adequate record. BellSouth Comments at 12.

195 NYDPS Petition at 5. See also PaPUC Petition at 6; California Petition at 5-6.

196 Id. See also NARUC Petition at 8, 11.

197 Id. at 5 (quoting General Telephone).

198 NARUC Petition at 8-10; PaPUC Petition at 5; NYDPS Petition at 4.

199 NARUC Petition at 7-9, 11; California Petition at 7; BellSouth Comments at 11. See NYDPS Petition at 6-7.

video dialtone platform as ordinary telephone service.[200] The National Association of Regulatory Utility Commissioners (NARUC) argues that because the Act excludes intrastate services from FCC jurisdiction, the Commission cannot preempt state regulation of such video dialtone services unless the state's action negates the FCC's exercise of its authority over interstate service.[201]

117. BellSouth argues that, because the 1984 Cable Act gives states jurisdiction over non-cable intrastate services provided over cable systems, the states should have the same jurisdiction over those services when provided over a video dialtone system.[202] It states that the FCC may preempt state regulation "[i]f the precise subject matter of regulation cannot be severed for purposes of dual regulation, and the exercise of intrastate regulation over that matter will negate a valid federal policy."[203] California argues further that the FCC should require that LECs design video dialtone services and facilities to ensure that interstate and intrastate aspects can be jurisdictionally separated.[204]

118. Florida Cable Television Association (FCTA) urges the Commission to clarify that all video transport services are subject to FCC jurisdiction, in order to prevent jurisdictional forum shopping to evade relevant review processes.[205] FCTA argues that LECs are building video dialtone facilities and using such facilities to offer services such as video conferencing and medical imaging pursuant to state tariffs.[206] According to FCTA, "[b]y limiting...customers to 'non-broadcast' content, [LECs] have sought to bypass the FCC review otherwise required for video distribution."[207] According to BellSouth, point-to-point video transport services such as video conferencing and other video imaging transport services do not constitute video programming services and do not involve channel service or "transport of video programming directly to subscribers," which, according to

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200 NARUC Petition at 11-12; PaPUC Petition at 4-6; California Petition at 6-7.

201 NARUC Petition at 10. See BellSouth Comments at 12.

202 BellSouth Comments at 10-11.

203 Id. at 12. See also IBM Comments at 5.

204 California Petition at 8.

205 FCTA Petition at 11.

206 Id. at 7.

207 Id. at 7-8.

BellSouth, are the subject of the video dialtone proceeding.[208] Therefore, BellSouth argues, the Commission should reject FCTA's argument that LECs are trying to evade regulatory review.[209]

119. NARUC states that the FCC "cannot seriously contend" that states do not have jurisdiction under the Act to regulate portions of joint plant used for intrastate service, even if the plant is also used for video dialtone.[210]

120. Information Industry Association (IIA) argues that states should not regulate the provision of enhanced video dialtone services.[211] IIA asserts that such regulation by different states "would threaten the orderly development of video dialtone by establishing a patchwork of inconsistent or conflicting state regulatory requirements, in stark defiance of this Commission's conclusions on how best to protect consumers and serve the public interest."[212] As a result, IIA urges the Commission to "send a strong signal" that "jurisdiction of enhanced video dialtone services rests squarely in the national arena."[213]

**Discussion**

121. We now modify our assertion in the Second Report and Order of exclusive jurisdiction over all video dialtone services. We hold that we have exclusive jurisdiction over only interstate video dialtone services, which include services involving delivery of video communications that are part of a continuous stream of communication provided at least partially by means of radio waves. We hold that states have jurisdiction over intrastate video dialtone services.

122. In General Telephone, the court held that channel service provided by a LEC for a cable operator, formerly known as

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208 BellSouth Comments at 17-18. BellSouth argues further that FCTA's petition for clarification is really an untimely filed petition for reconsideration. Id. at 15-16. BellSouth states that the Commission must dismiss the petition, because the time limit for filing petitions for reconsideration is statutory and cannot be waived. Id. at 16.

209 Id. at 17-18.

210 NARUC Petition at 10.

211 IIA Comments at 4-5.

212 Id. at 5.

213 Id. at 6.

a community antenna television operator, is "an integral component in an indivisible dissemination system which forms an interstate channel of communication from the broadcaster to the viewer."[214] The court held that the Commission has exclusive jurisdiction over LEC provision of services that form part of a broadcast transmission.[215] Because broadcasting is inherently interstate, the court held, LEC delivery of signals that have been broadcast over radio waves is interstate, even if the LEC delivers such signals over physically intrastate facilities.[216]

123. Consistent with General Telephone, we conclude that broadcast or other radio-based video signals delivered by a LEC over a video dialtone system constitute an integral part of an interstate radio transmission service. Accordingly, we have exclusive jurisdiction over video dialtone services involving delivery of video communications that are part of a continuous stream of communication provided at least partially by means of radio waves. A determination of whether certain other, non-radio-based video dialtone services are interstate and thus within our exclusive jurisdiction depends upon the nature of the communication, as in the telephone context.[217] For example, we have exclusive jurisdiction over all video dialtone services provided between two or more states because such services are interstate. In contrast, under Section 2(b) of the Communications Act, states retain authority to regulate intrastate video dialtone service to the extent such regulation has not been preempted by the Commission under the standards set forth in Louisiana Public Service Commission and its progeny.[218] For example, states have jurisdiction over the delivery by wire of video programming between a video library and an end-user located within the same state, as part of a video-on-demand service.

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214 General Telephone, 413 F.2d at 401.

215 See Id.

216 See General Telephone, 413 F.2d at 401, 402; see also New York Telephone Company v. FCC, 631 F.2d 1059, 1066 (2d Cir. 1980) (New York Telephone).

217 See New York Telephone, 631 F.2d at 1066.

218 See, e.g., Louisiana Public Service Commission v. FCC, 476 U.S. 355, 375 n.4 (1986); Public Service Commission of Maryland v. FCC, 909 F.2d 1510 (1990); National Association of Regulatory Utility Commissioners v. FCC, 880 F.2d 422, 429 (D.C. Cir. 1989). See also Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rcd 1619 (1992), aff'd, Georgia Public Service Commission v. FCC, 5 F.3d 1499 (11th Cir. 1993).

124. While we do not in this proceeding preempt any state regulation of intrastate video dialtone services, we note that we have already preempted certain state regulations of BOC provision of enhanced services in the BOC Safeguards Order. In that decision, we preempted any state regulation requiring (1) separation of facilities and personnel to provide the intrastate portion of jurisdictionally mixed enhanced services; or (2) prior authorization for use of CPNI whenever such authorization is not required by our rules.[219] Because we have explicitly applied our existing enhanced services safeguards to video dialtone, state regulation in the areas preempted in the BOC Safeguards Order are also preempted by that decision in the video dialtone context. We reject various parties' requests for broader preemption at this time, but we will consider preempting any state regulation of intrastate video dialtone service that is not severable from interstate service if such regulation would negate federal policy.

## B. Regulatory Framework and Safeguards

### 1. Section 214 Process

**Background**

125. Under Section 214 of the Act, LECs must obtain the Commission's approval before constructing or extending a line that it will use for interstate communications. In their Section 214 applications, LECs must describe in full the proposed facilities and the economic justification for their deployment. This showing must include, for example, detailed information regarding projected costs and revenues and the assumptions underlying these projections. LECs must also demonstrate that their facilities and proposed services will comply with the Commission's rules and policies.

126. In the Second Report and Order, the Commission required LECs to obtain prior authorization of video dialtone facilities pursuant to Section 214 of the Act.[220] The Commission stated that it would use the Section 214 process to examine particular video dialtone proposals for consistency with the public interest. For example, the Commission noted its intention to address the adequacy of existing safeguards to prevent cross-subsidization or discrimination by LECs against certain video programmers or

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219 BOC Safeguards Order, 6 FCC Rcd at 7631. This decision was recently affirmed in part by the U.S. Court of Appeals for the Ninth Circuit. California v. FCC, Nos. 92-70083, 92-70186, 92-70217, and 92-70261, slip op. at 12743, 12774-5 (9th Cir. October 18, 1994).

220 7 FCC Rcd at 5820, para. 73.

subscribers, as well as the extent of our jurisdiction over video dialtone, in the context of specific video dialtone proposals.[221]

**Pleadings**

127. Several LECs seek reconsideration of our decision to require Section 214 certification for video dialtone facilities.[222] Some LECs argue that we lack jurisdiction to require Section 214 certification for network upgrades for video dialtone because some video dialtone services will be intrastate in nature.[223] They argue that even though the Commission has required Section 214 certification for the construction by LECs of physically-intrastate stand-alone cable systems for cable operators, it has not otherwise required LECs to obtain Section 214 certification to transport video signals over physically intrastate facilities.[224]

128. LECs argue further that network upgrades for video dialtone fall outside the scope of Section 214 because that provision does not require certification for replacement of or changes to existing facilities.[225] Some LECs also urge the Commission to apply to video dialtone the statutory exceptions for local branch or terminal lines not exceeding ten miles in length.[226]

129. Several petitioners argue that the Section 214 process is burdensome and unnecessary, and will delay the introduction of

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221 Id. at 5820, 5823, paras. 73, 79.

222 Bell Atlantic Petition at 8; Bell Atlantic Reply Comments at 5-6. See also Ameritech Petition at 9; Ameritech Reply Comments at 9.

223 Ameritech Comments at 9; Bell Atlantic Petition at 7-8; Bell Atlantic Comments at 5.

224 Bell Atlantic Petition at 7-8.

225 Bell Atlantic Petition at 8 (citing 47 U.S.C. § 214(a)); PacTel Petition at 14; PacTel Reply Comments at 6; Ameritech Petition at 9; Ameritech Reply Comments at 9; NYNEX Comments at 4. See also USTA Comments at 16.

226 PacTel Petition at 14; PacTel Reply Comments at 6; Ameritech Reply Comments at 9; NYNEX Comments at 4. See also USTA Comments at 16.

video dialtone service.[227] For example, GTE states that the Commission has already made a public interest determination that LEC construction of broadband facilities to provide video dialtone is in the public interest; therefore, according to GTE, no further prior facilities authorization should be required.[228] GTE, along with several other petitioners, argue that the tariff review process, not the Section 214 process, is the appropriate vehicle for reviewing individual video dialtone proposals.[229] Similarly, NYDPS opposes using the Section 214 process to determine the jurisdictional nature of video dialtone service.[230]

130. A number of LECs ask the Commission to streamline the Section 214 process, either by limiting the number of proposals subject to the Section 214 requirement, or by establishing time limits on the processing of Section 214 applications.[231] Some LECs argue for expedited approval and a presumption of lawfulness for video dialtone proposals using already-approved technology or architecture.[232] The LECs also ask the Commission to apply its streamlined Section 214 processes for small projects and for

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227 GTE Petition at 4, 6-7; GTE Reply Comments at 7-9; Bell Atlantic Petition at 9; NYNEX Comments at 2. Some LECs argue that video programmers are less likely to discuss projects that require a Section 214 application. US West Petition at 10; PacTel Petition at 16.

228 GTE Petition at 4; GTE Reply Comments at 2-4, 8-9. According to GTE, Section 214 "was not statutorily designed as an approval mechanism for service offerings, but as a certification of the public need for deployment of facilities." GTE Reply Comments at 3. GTE adds that any application of the Section 214 certification requirement to services or to regulatory safeguards therefore constitutes a policy decision by the Commission, rather than a statutory requirement. Id. at 3 n.8.

229 GTE Petition at 5-7; GTE Reply Comments at 5-7; SNET Comments at 9; NYNEX Comments at 2; USTA Comments at 15; Bell Atlantic Reply Comments at 6; PacTel Petition at 16-17; PacTel Reply Comments at 7-9.

230 NYDPS Petition at 6.

231 PacTel Petition at 12-16; PacTel Reply Comments at 6-7; Bell Atlantic Petition at 9; US West Petition at 10-11; SNET Comments at 9; NYNEX Comments at 4-5; USTA Comments at 15-16; Ameritech Comments at 9; Ameritech Reply Comments at 9. See also PaOCA Comments at 11.

232 US West Petition at 11; NYNEX Comments at 5; PacTel Petition at 13. See also USTA Comments at 16; Ameritech Reply Comments at 9.

continuing authority.[233] Bell Atlantic asks the Commission to permit LECs to file "generic" applications, to avoid having to file applications on a community-by-community basis.[234] NYNEX requests that the Commission grant temporary approval before completion of the full Section 214 review.[235] NYNEX also opposes subjecting video dialtone trials to a Section 214 certification requirement.[236]

131. US West proposes a four to six month time limit for Commission action on Section 214 applications, and an automatic approval process absent Commission denial of the applications.[237] Pennsylvania Office of Consumer Advocate (PaOCA), states that it would not object to a six-month "auto-grant" procedure for conditional authority, if the application contains information on the proposed removal, separation, allocation and recovery of costs, and if carriers are required to disclose their treatment of costs in their tariff filings.[238] Bell Atlantic proposes a 30-day "auto-grant" procedure, with a 90-day time limit if the Commission begins an investigation.[239] Bell Atlantic argues that such a time limit will prevent competitors from "gaming" the process to avoid competition.[240]

132. Several parties dispute claims that we lack jurisdiction or authority to require Section 214 approval of video dialtone facilities. BellSouth, for example, contends that the Commission has exclusive jurisdiction over deployment of interstate video dialtone facilities, even if those facilities are also used to provide intrastate communication services. "To hold otherwise," according to BellSouth, "would necessarily grant state regulators veto power over the construction and provision of interstate

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233 PacTel Petition at 14-15; PacTel Reply Comments at 6; NYNEX Comments at 4 (citing 47 C.F.R. §§ 63.02, 63.03 and 63.07). NYNEX also asks us to clarify whether rules specifically applicable to channel service -- such as §§ 63.55 and 63.57 of the Commission's rules -- apply to video dialtone. NYNEX Comments at 4-5.

234 Bell Atlantic Petition at 9. See also NYNEX Comments at 4-5.

235 NYNEX Comments at 5-6.

236 Id. at 1-4.

237 US West Petition at 11 n.18. See NYNEX Comments at 4.

238 PaOCA Comments at 10.

239 Bell Atlantic Petition at 9; NYNEX Comments at 4, 5.

240 Bell Atlantic Petition at 9.

facilities and services."[241] Other parties challenge assertions that facility upgrades to provide video dialtone fall outside the scope of Section 214. PaOCA, for example, argues that Section 214 approval is required because video dialtone may require new construction and/or substantial costs.[242]

133. A number of parties also respond to assertions that the Section 214 process is unnecessary or that it should be streamlined. They argue that the full Section 214 review must be retained, given the Commission's reliance on the Section 214 process to address the adequacy of existing safeguards against cross-subsidization and discrimination.[243] For example, NCTA contends that the Section 214 review is the "only means for ensuring that video dialtone services are not anti-competitively structured or priced."[244] Several parties argue that full Section 214 review is required so that interested parties may participate in a meaningful fashion in reviewing the telephone companies' proposals.[245] Local governments assert that the tariff process is inadequate because the FCC is not required to consider as broad a range of public interest issues as in the Section 214 process.[246] CFA/CME argue that placing a time limit on Section 214 applications would stretch FCC resources, resulting in an inadequate review of Section 214 applications and/or a diversion of FCC resources from other important areas.[247] FCTA contends that the FCC is required to subject LECs to careful Section 214 review to ensure consistency with its policies.[248]

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241 BellSouth Comments at 12. See also IBM Comments at 3-4.

242 PaOCA Comments at 7-9. See also NCTA Comments at 7 n.14.

243 PaOCA Comments at 4-9; CFA/CME Comments at 13-14; NCTA Comments at 8; CLG Comments at 9.

244 NCTA Comments at 8.

245 Compuserve Comments at 5; CLG Comments at 9-10. See CFA/CME Comments at 14. CLG argues that Section 214 review gives local governments prior notice of service proposals, allowing them to take appropriate regulatory action. CLG Comments at 9-10.

246 CLG Comments at 10.

247 CFA/CME Comments at 15-16. CFA/CME also argue that such a deadline would be speculative, resulting in unreasonable deadlines. Id. at 16.

248 FCTA Comments, at 7 (citing NCTA v. FCC, 747 F.2d 1503, 1510 (D.C. Cir. 1984)).

134. Some petitioners argue that the Commission should not rely on Section 214 applications to address critical video dialtone issues, including technical standards and safeguards.[249] CFA and NCTA argue in their Joint Petition that the Commission should hold Section 214 applications in abeyance until it has instituted and completed a comprehensive proceeding further addressing cost allocations, separations, access charges, and safeguards relating to joint marketing and customer privacy.[250] Few parties support delaying Section 214 certifications.[251] Most commenters believe that such delay is unnecessary, would thwart the attainment of the Commission's video dialtone goals, and would prevent the collection of information necessary to evaluate the adequacy of existing rules and policies or to understand better how video dialtone networks and services are likely to develop.[252] Several LECs declare that the CFA/NCTA request is an anticompetitive tactic to keep LECs out of the video marketplace.[253]

135. In the alternative, CFA and NCTA argue that such Section 214 certificates should be conditioned on compliance with any additional video dialtone rules or safeguards the Commission eventually adopts.[254] Various parties support this alternative.[255]

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249 NAB Petition at 3, 11-12; CFA/CME Petition at 32; PaPUC Petition at 8-9; DCPSC Jt. Pet. Comments at 3. See also NCTA Comments at 8; SNET Comments at 8; Joint Petition at 5-7.

250 Jt. Pet. at 5-7; CFA/NCTA Reply Comments to Jt. Pet. Comments at 6. See also CFA/CME Petition at 25, 33.

251 NJCTA Jt. Pet. Comments at 3, 9; NJCTA Reply Comments to Jt. Pet. Comments at 7; Indiana/Michigan Jt. Pet. Comments at 3; see also, NASUCA Jt. Pet. Comments at 9-10.

252 See, e.g., USTA Jt. Pet. Comments at 2-3; Ameritech Jt. Pet. Comments at 3-5; Ameritech Reply Comments to Jt. Pet. Comments at 3-5; AT&T Jt. Pet. Comments at 2; World Institute Jt. Pet. Comments at 3-6; PacTel Jt. Pet. Comments at 2-3, 6; NYNEX Jt. Pet. Comments at 5-6; Broadband Reply Comments to Jt. Pet. Comments at 1-3, 5-6; SNET Jt. Pet. Comments at 7; BellSouth Jt. Pet. Comments at 8; Edison Jt. Pet. Comments at 1-2; Hale Reply Comments to Jt. Pet. Comments at 1; TIA Jt. Pet. Comments at 2, 6-7.

253 Ameritech Jt. Pet. Comments at 4-5; USTA Reply Comments to Jt. Pet. Comments at 3; PacTel Jt. Pet. Comments at 2-3. See also Broadband Reply Comments to Jt. Pet. Comments at 1-2; NYNEX Jt. Pet. Comments at 5-6; Bell Atlantic Jt. Pet. Comments at 1.

254 Jt. Pet. at 5; CFA/NCTA Jt. Pet. Reply Comments at 2 n.1.

NYDPS urges us to defer decisions regarding LEC recovery of costs of video dialtone trials pending completion of the comprehensive rulemaking advocated by the joint petitioners. NYDPS asserts that the Commission employed a similar approach for recovering the costs associated with implementation of equal access.[256]

**Discussion**

136. We now affirm our decision to require LECs to obtain approval pursuant to Section 214 of the Act before beginning construction of video dialtone facilities or offering video dialtone service. We reject arguments that we lack authority to require such approval or that we should refrain from exercising that authority at this time. Because video dialtone is based upon new and evolving technologies, the Section 214 process is critical to our ability to ensure that video dialtone is implemented in a manner that best serves the public interest. Nevertheless, we permit LECs to seek generic approval of those aspects of a video dialtone system that do not require case-by-case review. In addition, we anticipate that, over time, as the service evolves and precedents are established, it may no longer be necessary to require the same level of Section 214 scrutiny to future video dialtone offerings. We will consider, at that time, on our own motion or on petitions of parties, streamlining our Section 214 requirements for video dialtone offerings.

**a. FCC Authority to Require Section 214 Certification**

137. As an initial matter, we conclude that the Commission has jurisdiction to require LECs to obtain Section 214 certification to upgrade existing facilities to provide video dialtone. Section 214(a) requires a carrier to obtain certification before constructing or extending a line it will use for interstate communications. Even facilities that are wholly located within a state are interstate for Section 214 purposes, if a LEC uses those facilities at least in part for interstate communications.[257] In General Telephone, the Commission stated that "[i]rrespective of the location of its physical facilities, the common carrier which...participates as a link in the relay of television signals is performing an interstate communications

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255 AT&T Jt. Pet. Comments at 2; NJBRC Reply Comments to Jt. Pet. Comments at 1 (specifically addressing the New Jersey Bell Section 214 application); NASUCA Jt. Pet. Comments at 3; NYDPS Reply Comments to Jt. Pet. Comments at 3.

256 NYDPS Reply Comments to Jt. Pet. Comments at 3-4.

257 See, e.g., New York Telephone, 631 F.2d at 1066; General Telephone, 413 F.2d at 402.

service."[258] It is clear from the video dialtone Section 214 applications filed to date that LECs will use video dialtone systems for interstate communications, including delivering video programming transmitted by means of radio waves.[259] Given the anticipated interstate use of video dialtone facilities, we hold that we have jurisdiction to require LECs to obtain Section 214 certification before upgrading facilities to provide video dialtone service.

138. We conclude further that an upgrade of LEC facilities to offer video dialtone service constitutes the establishment or extension of a "line" and entails "new construction," thus requiring Commission certification pursuant to Section 214.[260] In 1944, Congress amended Section 214 to define "line" as a "channel of communication established by appropriate equipment...."[261] In a case decided immediately after the provision was enacted, the Commission held that Section 214 required a carrier to obtain certification when it constructs new channels of communication by installing new carrier systems, as well as when it does so by laying wire.[262] By constructing video dialtone platforms, LECs will be installing new systems and laying fiber to create new channels of communication. If a LEC upgrades its network through installation of fiber and video dialtone-specific equipment, the network becomes capable of offering a far greater number of communication channels, as well as a new service -- video dialtone -- that it was not capable of providing before. The same conclusion applies if a LEC installs new equipment, such as

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258 General Telephone of California, 13 FCC 2d 448, 455 (1968), aff'd, General Telephone, supra note 184.

259 See, e.g., New Jersey Bell, supra note 38.

260 Section 214 requires certification for the construction of a "line," but does not require certification for "any installation, replacement, or other changes in plant, operation, or equipment, other than new construction...." 47 U.S.C. § 214(a).

261 See H.R. Rep. No. 142, 78th Cong., 1st Sess. 7 (1943). See also American Telephone and Telegraph Co., 10 FCC 315, 319 (1944) (AT&T Carrier).

262 See AT&T Carrier, 10 FCC at 321 (holding that AT&T's construction constituted "a major installation affecting service" and that excluding it from Section 214 review would be "anomalous" in light of the purpose of Section 214 -- "preventing improvident increases in facilities with consequent higher charges to the users of the service").

Asymmetric Digital Subscriber Line (ADSL) technology,[263] to be used with existing facilities. The Commission has found that similar activity triggers the Section 214 certification requirement.[264] Because video dialtone systems create new channels of communication, the systems constitute the establishment of lines under Section 214.

139. We also conclude that video dialtone systems involve "new construction." The exemption in Section 214 for "any installation, replacement, or other changes in plant, operation, or equipment, other than new construction" applies only if no new construction occurs, or any new construction or installation is minor.[265] Congress indicated that the provision was not intended to permit "communication carriers to make major installations or abandonments, or to modify existing installations to a degree that service is affected without first going to the Government regulatory agency for the authorizations duly provided by law."[266] The upgrading of existing facilities to be used for video dialtone generally constitutes substantial new construction,[267] and thus does not fall within this exemption. Most upgrades will not be achieved through minor changes in facilities, but rather through the wholesale replacement of existing facilities, typically costing

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263 ADSL technology permits a video signal to be delivered to residential subscribers along with basic telephone service over the same copper loop facilities, but additional equipment is also needed. See The Chesapeake and Potomac Telephone Company of Virginia, 8 FCC Rcd 2313 (1993).

264 See American Telephone and Telegraph Company, 91 FCC 2d 1, 14 (1982) (installation of packet switches containing multiplexers constituted the establishment of channels of communication requiring a Section 214 certification); Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261, 271 (1976) (resale carriers may have "substantial investment" in multiplexing or switching equipment, the addition of which creates new lines or channels under Section 214), aff'd sub nom. American Tel. and Tel. Co. v. FCC, 572 F.2d 17 (2d Cir. 1978).

265 Cong. Rec., 78th Cong., 1st Sess., p. 1093. The Conference Committee reported that the framers wanted to ensure that "carriers shall not be unduly burdened by unnecessary paper work, particularly in these wartimes...." Id.

266 Id.

267 See, e.g., New Jersey Bell, supra note 38; see also Pacific Bell, File No. W-P-C-6914; and Ameritech, File No. W-P-C-6929.

millions of dollars, including the removal and installation of substantial amounts of equipment.[268]

140. Furthermore, we conclude that new construction occurs even when LECs upgrade existing facilities to provide video dialtone through the addition of small amounts of equipment, because such upgrades enable the LECs to offer a new and different type of interstate service.[269] Section 214 requires a carrier to obtain certification before upgrading existing intrastate facilities for interstate service.[270] Thus, upgrading customer loops, which are currently used primarily for intrastate local exchange service, to provide video dialtone service, constitutes "new construction," and Section 214 certification is required. Moreover, because the construction of video dialtone systems does not constitute the construction of "local, branch, or terminal lines not exceeding ten miles in length," we reject arguments that we should apply the statutory exemption contained in Section 214(a)(2) of the Communications Act to LEC video dialtone Section 214 applications.[271]

**b. Elimination or Streamlining of Section 214 Requirement for Video Dialtone**

141. We decline to eliminate or streamline the Section 214 certification process at this time.[272] We reject arguments that the tariff review process is at this time, by itself, an adequate mechanism for overseeing video dialtone deployment. In the Second

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268 See AT&T Carrier, 10 FCC at 320 (Commission found that "[t]he establishment of carrier systems...required a substantial amount of construction in providing new wire lengths, buildings and other structures, and involved extensive construction work in removing voice frequency equipment and providing carrier equipment").

269 See supra paras. 121-124.

270 See New Jersey Bell, supra note 38.

271 See 47 U.S.C. § 214(a)(2); General Telephone, 413 F.2d at 403 ("Section 214(a)(2) was mean [sic] to permit nonsubstantial improvements or extensions for existing carrier facilities"). See also supra paras. 136-140.

272 NYNEX asks us to clarify the application of Sections 63.55 and 63.57 of the Commission's rules, 47 C.F.R. §§ 63.55, 63.57, to video dialtone. These provisions address channel service, not video dialtone, and thus do not apply to video dialtone service. In the Third Further Notice we seek comment on whether we should adopt an analogous rule for video dialtone service. See infra para. 285.

Report and Order the Commission emphasized that, because video dialtone is an emerging technology, and because we anticipate and encourage variations in network architectures, technology, and services, many important policy issues would likely be raised only in connection with specific video dialtone proposals.[273] We stated our intention to review these proposals carefully to ensure that video dialtone is implemented in a manner that best serves the public interest. Under the circumstances, streamlining our Section 214 process, by, for example, establishing time limits for the disposition of Section 214 applications or exempting trials, could preclude us from properly overseeing the implementation and monitoring the evolution of video dialtone.

142. For similar reasons, we also decline to limit the type of construction or deployment subject to full Section 214 review. While it may be that some video dialtone applications, such as those using already approved technology or architecture, may require less rigorous scrutiny than other applications, we do not believe that it is necessary or wise to mandate special procedures for such applications. Particularly during the early stages of video dialtone implementation, even those applications that use previously approved architectures may pose other issues that warrant careful consideration in the context of that specific proposal. For instance, many of the video dialtone applications currently on file with the Commission use a hybrid fiber-coaxial architecture but propose service arrangements that differ in other respects. Our processing of Section 214 applications also enables the Commission to consider other factors that may be relevant to the determination of whether a proposed video dialtone service will serve the public interest, convenience and necessity, such as whether the proposal is economically justified and complies with the Commission's rules and policies, and the extent to which the state in which the service is proposed authorizes competition for local exchange services. In addition, the Commission can weigh the effect of other measures that may have been adopted by state regulators to protect ratepayers, such as price caps for residential service rates, or other policies that limit the ability of LECs to raise prices to captive ratepayers of local telephone services.

143. While we therefore do not streamline our Section 214 process at this time, we will consider generic applications for approval of those aspects of a Section 214 application that do not require case-by-case consideration.[274] These generic applications

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273 Second Report and Order, 7 FCC Rcd at 5840, para. 117.

274 A LEC might file a generic application, for example, to seek approval of a proposal, to be implemented on multiple video dialtone systems, for meeting our capacity requirement or for a

can serve to narrow the range of issues to be considered in the Section 214 process. We also note that we anticipate that, as video dialtone evolves, and we develop a body of precedent governing its implementation, the Section 214 process may become a less critical vehicle for identifying and addressing policy issues, thereby making streamlining appropriate at that time.

144. Finally, as another possible means of expediting the Section 214 process, we direct the Bureau to consider whether it would serve the public interest to clarify in a Public Notice the basic information that the Commission requires in a video dialtone Section 214 application. We note that the Bureau has found it necessary to request additional information from LECs in connection with the Bureau's review of virtually every application that has been filed for Section 214 authorization to construct a commercial video dialtone system.[275] Further clarification of the information required in a Section 214 application could help LECs avoid the delays that necessarily result when applications have to be supplemented.[276]

**c. Delaying Section 214 Certifications**

145. Some petitioners also ask that we delay processing of Section 214 applications until we undertake a comprehensive review of our cost allocation rules and other safeguards for video dialtone. We determined in the Second Report and Order and affirm now that our existing rules and safeguards generally will prevent improper cross-subsidization and discrimination by LECs in the

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channel sharing mechanism. A subsequent LEC Section 214 application proposing such capacity or channel sharing arrangements would need only cross-reference the previously approved generic application. LECs would, however, have to provide any additional information otherwise required for consideration of that subsequent application.

275 See, e.g., New Jersey Bell, 9 FCC Rcd at 3678, para. 3; Letter, dated April 28, 1994, from A. Richard Metzger, Jr., Acting Chief, Common Carrier Bureau, to Anthony M. Alessi, Director, Federal Relations, Ameritech; Letter, dated August 26, 1994, from Kathleen M.H. Wallman, Chief, Common Carrier Bureau, to Alan F. Ciamporcero, Executive Director, Federal Regulatory Relations, Pacific Telesis Group.

276 We are relying on the Bureau to review applications for Section 214 authority with care. Accordingly, we caution carriers that processing of Section 214 applications may be delayed if the applications do not contain necessary information or if information sought by the Bureau staff is not provided.

provision of video dialtone.[277] Therefore, we do not believe that an additional comprehensive review of these rules is necessary prior to the implementation of video dialtone service. Indeed, to the extent that any further changes in these rules may be necessary, permitting deployment of video dialtone should provide us with a better basis for fashioning such changes. We thus decline to defer consideration of Section 214 applications pending a comprehensive review of our rules. We will, however, condition the granting of each Section 214 certificate on implementation of any accounting and other safeguards that we have adopted or subsequently adopt.[278] Contrary to several petitioners' arguments, we do not think that considering the need for additional safeguards on a case-by-case basis would result in inconsistent regulatory treatment. Rather, such an approach will ensure that the safeguards imposed in each case will consider unique facts associated with that video dialtone offering.

### 2. Cross-Subsidy/Pricing Issues

**Background**

146. Costing Rules. The Commission's accounting and cost allocation rules were originally developed as part of a program of rate base/rate of return regulation (ROR) of interstate telephone rates. The rules remain in full effect, although their role in the development of rates is greatly attenuated for the largest companies, almost all of which are now subject to price cap regulation.

147. Under ROR, rates are tied directly to costs, and much regulatory attention is devoted to the identification of the costs to be assigned to a particular regulated service. Cost allocations are made because most of the costs of interstate telephone services are joint and common costs. That is, costs are shared with intrastate telephone services, with other interstate services, and often with various nonregulated activities of the company. Over time, the Commission developed rules governing all of these cost allocations.[279]

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277 See infra paras. 146-223.

278 The Commission has applied such accounting safeguards to video dialtone applications already processed. See, e.g., New Jersey Bell, 9 FCC Rcd at 3685-6, paras. 42-43, 72.

279 See Separation of the Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Notice of Proposed Rulemaking, 104 FCC 2d 59, 63-78 (1986) (Joint Cost NPRM) (review of the Commission's historical involvement with cost allocations).

148. The regulated company records its costs and revenues in accordance with Part 32 of the Commission's Rules, the Uniform System of Accounts for Telecommunications Companies (USOA).[280] The USOA is a historical financial accounting system that incorporates generally accepted accounting principles (GAAP) where consistent with regulatory needs. Investment and expense accounts are designed to record costs in accordance with the functions of equipment and people; the USOA does not allocate costs between regulatory jurisdictions or among services.

149. Costs recorded in Part 32 accounts are separated between regulated and nonregulated activities in accordance with the Joint Cost rules (Part 64).[281] The Joint Cost rules use a fully distributed costing (FDC) approach: most costs are either directly assigned or are apportioned on a cost-causative basis, with all remaining overheads allocated using a general allocator.[282] Large carriers must file cost allocation manuals (CAMs) that describe specifically how they group costs into homogeneous cost pools and how they allocate costs in those pools to nonregulated activities. CAMs are public documents reviewed by Commission staff after opportunity for public comment.

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280 47 C.F.R. §§ 32.1-32.9000. Local exchange carriers that are fully subject to the Communications Act are required by the Commission to use the USOA. Most other local exchange carriers, i.e., "connecting carriers" described in Section 2(b)(2) of the Communications Act, 47 U.S.C. § 152(b)(2), are required by their state regulatory commissions or as conditions to Rural Electrification Administration (REA) loans to use the USOA.

281 47 C.F.R. §§ 64.901-64.904; see Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, 2 FCC Rcd 1298 (1987) (Joint Cost Order), recon., 2 FCC Rcd 6283 (1987), further recon., 3 FCC Rcd 6701 (1988), aff'd sub nom. Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990). The Joint Cost rules were promulgated under authority of Sections 201-205 of the Communications Act as well as under Section 220, and therefore apply both to LECs that are fully subject carriers and to LECs that are connecting carriers. Joint Cost Order, 2 FCC Rcd at 1309, para. 82.

282 The Commission chose an FDC approach for nonregulated activities not because that approach was necessary to prevent improper cross-subsidization, but because the Commission determined that ratepayers should share in any economies of scale and scope that could be achieved through integration of basic and enhanced services. Joint Cost Order, 2 FCC Rcd at 1312, para. 109. The Part 64 rules produce aggregated nonregulated costs; they do not provide for allocation of costs to specific nonregulated activities.

150. The regulated costs of most LECs are separated between the state and interstate jurisdictions in accordance with the Jurisdictional Separations Manual (Part 36).[283] Under Section 410(c) of the Communications Act, changes to the separation of common carrier property and expenses that are instituted pursuant to notice and comment rulemaking must be referred to a Federal-State Joint Board.[284] Part 36 is an FDC system that, in the most general of terms, separates costs in accordance with the relative state and interstate usage of telecommunications plant. Local loop plant, however, which comprises about 37.6% of total plant in service and 44.2% of network plant, is separated based on a fixed allocation factor: 25% of the costs flow to the interstate jurisdiction, 75% of the costs flow to the states.[285] Part 36 definitively assigns costs and revenues as between the regulatory jurisdictions, but neither the states nor the Commission are obliged by Part 36 to use in ratemaking the particular cost allocations that are made for separations purposes.

151. The Commission's access charge rules (Part 69) start with the costs allocated to the interstate jurisdiction under Part 36 and further apportion those costs among interstate access rate elements and subelements and the interexchange category on an FDC basis.[286] To the extent it prescribes rate elements, Part 69 governs

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283 47 C.F.R. §§ 36.1-36.741. Some small LECs set their interstate access rates under an average cost schedule prepared by the National Exchange Carrier Association, Inc. (NECA). State regulators may, if they wish, determine intrastate revenue requirements by the residual cost method of subtracting the average schedule revenues from total regulated costs, rather than by applying Part 36. See Crockett Telephone Co. v. FCC, 963 F.2d 1565 (D.C. Cir. 1992).

284 47 U.S.C. § 410(c).

285 1991 ARMIS figures. This allocator does not represent an approximation of state and interstate use of the loop, but was a negotiated factor developed by the Joint Board. See Amendment of Part 67 of the Commission's Rules, CC Docket 80-286, 49 Fed. Reg. 7934 (March 2, 1984). The Separations Manual incorporates certain explicit subsidies running from interstate services to the local exchange services of certain carriers. See 47 C.F.R. §§ 36.601-36.641 (Universal Service Fund support for study areas with high loop costs); 47 C.F.R. § 36.125 (interstate assistance to switching costs of small study areas).

286 See Amendment of Part 69 of the Commission's Rules and Regulations, Access Charges, to Conform it with Part 36, Jurisdictional Procedures, 2 FCC Rcd 6447 (1987), modified on recon., 4 FCC Rcd 765 (1988).

the rate structure of interstate access services.[287] For those carriers that remain subject to ROR, the FDC costs assigned to rate elements by Part 69 also have a direct effect on rate levels.

152. Pricing rules. Since 1991, most large LECs have been subject to price cap regulation under Part 61.[288] Prices for services that were offered at the time of the initial implementation of price cap regulation were based on a carrier's existing rates, as developed under ROR. Rates for services offered for the first time under price cap regulation are reviewed initially under a cost-based test developed for price caps, but are excluded from the calculation of the price cap indices. New services are brought into the price cap indices in the carrier's next annual price cap tariff filing after the completion of the base year in which the service is first offered.

153. Once under price caps, the rates are no longer tied directly to allocated costs. Rather, prices are limited by a formula that permits increases to reflect changes in inflation, offset by an amount reflecting expected productivity gains, and adjustments for changes in exogenous costs. The carrier's ability to offset price decreases in some services with increases in others is restricted by the grouping of services into baskets and, within baskets, into service categories.

154. The LEC price cap plan, unlike the price cap plan for AT&T, retains a connection between total interstate costs and overall rate levels by means of sharing and lower end adjustment mechanisms. Sharing requires LECs with interstate earnings greater than specified levels in one calendar year to return half of the additional earnings (and all earnings above an upper limit) to ratepayers in the form of lower rates in the next rate period.[289] The lower end adjustment allows LECs that earn below 10.25% to

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287 The rate structures of switched access services are prescribed in some detail. By contrast, there are no prescribed subelements for private line and other special access services. See 47 C.F.R. §§ 69.101- 69.128 (1993).

288 47 C.F.R §§ 61.41-61.49 (1993); see Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786 (1990) (LEC Price Cap Order), modified on recon., 6 FCC Rcd 2637 (1991) (LEC Price Cap Reconsideration Order), aff'd., National Rural Telecom Ass'n. v FCC, 988 F.2d 174 (D.C. Cir. 1993).

289 LECs that use a productivity offset of 3.3% in the price caps formula must share 50% of earnings above 12.25% and 100% of earnings in excess of 16.25%. For a LEC that elects to use a productivity offset of 4.3%, the earnings benchmarks are 13.25% and 17.25%. LEC Price Cap Order, 5 FCC Rcd at 6788, paras. 7-8.